

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATIONS No 299, 5122, 5646, 3010,  
1851, 1838, 4439, 3813 of 1994, 5409 of 1995, 6467,  
4548 of 1996. (In all 11 matters).

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. Sd/-

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? Yes @@

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2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy  
of the judgement? No

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?  
No

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G B VADUKAR

Versus

STATE OF GUJARAT

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Appearance:

MR YS LAKHANI for Petitioner  
GOVERNMENT PLEADER for Respondent No. 1  
MR DA BAMBHANIA for Respondent No. 2

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 08/05/97

ORAL JUDGEMENT

In all these petitions, an identical question has been raised. Hence, they are decided by this common judgement.

The petitioners in all these petitions are the Clerks of the Court working at various districts. The question relates to fixation of their pay on their promotion to the post of Clerk of the Court and on promotion they were transferred outside their districts to assume charge of the office on promotion. Except the petitioner in Special Civil Application No. 4439 of 1994, all have been promoted after 1.1.1986, between 20.5.1986 and 23.7.1993. The clerical staff of the District Court and other subordinate Courts are not ordinarily transferred from one district to another district. However, on being promoted to the cadre of Clerk of the Court, such transfer is envisaged. It appears that, since transfers outside the district at that stage of career cause peculiar hardship without any additional financial advantage, the tendency had grown, where the promotional opportunity came in the way of the staff on the post of Clerk of the Court with obligation to join away from home town to out of district, the incumbents preferred to forego the promotions rather than accepting the promotions and join duty elsewhere, which resulted in a situation where it became difficult to man the post of Clerk of the Court as in great number of cases the employees refused promotion. To meet this situation, attention of the State Government was invited and, by resolution dated 3.6.1976, following order was made.

"1. Under the Gujarat Civil Services

(Revision of Pay) Rules, 1975, the pay scale of the post of the Clerk of the Court on the District set-up has been revised to Rs.500-25-650-EB-25-750-900. It was represented to Government that the fixation of pay under the normal rules of the B.C.S. Rules of a Government Servant, when promoted to the post of the Clerk of the Court from the lower posts, involves hardships to the employee concerned in that, while he is posted as Clerk of the Court outside the District in which he is serving he does not

get any material benefit at the time of the promotion. Sometimes such a Government servant does not accept the post of Clerk of the Court. In the circumstances, the High Court administration finds it extremely difficult to man the posts of the Clerk of the Court, as in a great number of cases, the employees have refused promotion.

2. The Government has considered this question sympathetically and is pleased to direct that the High Court of Gujarat may be authorised to fix the pay of the incumbent of the post of the Clerk of the Court when promoted from the lower posts at the initial stage not exceeding Rs. 650/- in the scale of Rs. 500-25-650-EB-25-750-900 provided he is posted outside the District in which he is serving under Rule 51 of the Bombay Civil Services Rules.
3. These orders shall apply to the cases of appointments made after the date of issue of these orders."

This resolution has since not been rescinded. However, since the making of the resolution, the pay-scales applicable to the post of Clerk of the Court have been revised from time to time. At the time when the resolution was made, the pay-scale applicable to the said post was Rs. 500-25-650-EB-25-750-900 under the Gujarat Civil Services (Revision of Pay) Rules, 1975. Thereafter, in 1980 under the very same Rules, the pay-scale of Rs. 650-1040 was made applicable to the non-gazetted post of Clerk of the Court (District Court). When the pay-scales were revised in 1987 with effect from 1.1.1986 under the Gujarat Civil Services (Revision of Pay) Rules, 1987, the pay-scale which was made applicable to the cadre of Clerk of the Court (District Court) corresponding to the pay-scale of Rs. 650-30-740-35-810-EB-35-880-40-1040 (Sr.No. 36) was Rs. 2000-3200. The pay of all the petitioners in the aforesaid cases on their promotion to the post of Clerk of the Court with stipulation of transfer was fixed by giving six premature increments on such promotion in terms of the aforesaid resolution, as per the directives of the High Court, by respective competent authorities under whom the petitioners were placed. The payments in accordance with the fixation by granting premature increments in terms of the aforesaid resolution were also made to the respective petitioners. The State Government

taking the stand that the resolution dated 3.6.1976 stood automatically inoperative, the pay-scale of the Clerk of the Court which at the time of issue of circular was Rs. 500-900 stood revised in the first instance to Rs.650-900 and thereafter to Rs.650-1040 and ultimately on announcement of the revised pay-scale under the Rules of 1987 fixing the pay-scale of the Clerk of the Court at Rs.2000-3200. In that view of the matter, the Government cancelled the respective orders of fixation of pay on promotion with transfer outside district and ordered for recovery of excess amount paid to them by withdrawing the premature increments given by applying the aforesaid resolution of 1976 in terms of the decision of the High Court on its administrative side in that regard. In some of the cases, it also resulted in revision of pensionary benefits, reduction in pension and recovery of amount paid after retirement as pension, and other retiral benefits as a result of retrospective refixation of the pay at the stage of initial appointment to the post of Clerk of the Court by promotion with transfer. It is this action of the respondent-State in denying the benefits of resolution of 1976 to the petitioners who were promoted after the revision of pay and consequential order of recovering the excess amount paid since the fixation, by withdrawing the benefit of release of premature increments resulting in the case of persons continuing by promotion in service adversely affecting their current and future emoluments, and in the case of persons who have since superannuated, affecting their pensions and retiral benefits adversely, which is under challenge by way of the present writ petitions.

The contention raised before me by the learned counsel for the petitioners is that the resolution of 1976 having been not withdrawn or rescinded by the Government, it is still operative and it was for the High Court to have fixed the pay of the incumbents of the post of Clerk of the Court at the material stage in the pay-scale applicable to the post of Clerk of the Court as may be applicable from time to time and the fixation having been made in accordance with resolution under the authorisation of the High Court, there does not exist any ground for holding the fixation to be erroneous and taking recourse to recovering the alleged excess amount paid to the petitioners. It was also urged that the order withdrawing the premature increments granted in favour of the petitioners by the competent authority and resorting to recovery by holding the order to be erroneous could not be made without giving any opportunity of hearing to the petitioners, as the same has been made, inasmuch as the order results in civil

consequence for the petitioners. Lastly, it was urged that even if the orders of premature increments in favour of the petitioners on their promotion to the post of Clerk of the Court are held to be erroneous, undeniably and undisputedly it is not the case in which reasons for fixation at higher stage in the applicable pay-scale has been made, can be attributed to any misrepresentation made by the petitioners in that regard but fixation of pay has taken because of the bonafide view taken by the High Court in its administrative side about the applicability of the resolution, the amount paid under the said fixation until the date of order ought not to be recovered from the petitioners.

On the other hand, it has been urged by the learned Government Pleader that the relaxation having been given only in the pay-scale of Rs. 650-900 in the matter of fixation of pay on promotion coupled with transfer outside the district, as soon as the said pay scale ceased to apply to the cadre in question, the resolution had fulfilled its object and did not remain operative thereafter. It automatically came to an end. It was urged that at any rate when the revised pay-scale Rules of 1987 came into force, all resolutions issued in the existing Revision of Pay Rules of 1975 stood automatically repealed and no advantage of fixation under that can be given to the petitioners in case of promotees after 1.1.1986. The revised pay-scale of 1987 must be deemed to be in force w.e.f. 1.1.1986 and the relaxation made under the Rules of 1976 must be deemed to have come to an end and not existing. However, it was not disputed that no notice was issued before making the impugned orders in each case withdrawing the initial pay fixation by granting premature increments and ordering recovery. He has also expressed after seeking instructions that, unless the Court directs the State is not inclined to reconsider its orders to effect recovery in pursuance of impugned orders.

Both the learned counsel agree that instead of sending the matter back to the State Government for giving formal opportunity of hearing to the petitioners by issuing show cause notice, the case may be decided on merits.

The first question that arises for consideration is whether the resolution dated 3.6.1976 continues to be operative or it ceased to be operative as soon as the pay scale has been revised and the Gujarat Civil Services (Revision of Pay) Rules, 1987 have come into force. This issue bears another question whether the resolution of

1976 said to have been issued under the Rules of 1975 or under the Bombay Civil Services Rules. It would be apposite to notice in the first instance the Rules of 1975. The Rules of 1975 were brought into effect with effect from 1.1.1973. Rule 4 provided that as from the date of commencement of the rules, the scale of pay of every post specified in column 2 of the Schedule-C shall be as specified against it in column 4 thereof. Rule 5 provided that a Government Servant save as otherwise provided in the rules shall draw pay in the revised scale applicable to the post to which he is appointed subject to the option of the Government Servant that he may elect to continue to draw pay in the existing scale until the date on which he earns his next or any subsequent increment in the existing scale or until he vacates his post or ceases to draw pay in that scale. The existing scale in relation to a Government servant was defined to mean the present scale applicable to the post as on the 1st day of January, 1973 whether in a substantive or officiating capacity under Rule 3(iv). Rules 6 and 7 deal with fixation of pay in the revised pay-scale on exercise of option. Rule 8, which is of some significance for the present purposes, provides that in cases where the pay fixation results in giving pay at a stage after the efficiency bar in the revised scale while the pay in the existing scale was at a stage earlier than the efficiency bar in that scale the Government servant shall be subject to the efficiency bar in the revised scale before he can be allowed his next increment. Rule 9 concerns the date of next increment in the revised scale on fixation therein. Rule 10 deals with the case where a Government servant continues to draw his pay in the existing scale as on 1.1.1973 and is brought over to revised scale from a day later than 1.1.1973 and provided the manner in which pay from the later date in the revised scale to be fixed. Rule 11 provides for payment of arrears on fixation in terms in the revised pay scale with effect from 1.1.1973. Rule 12 provided that where the pay is regulated under these Rules, the provisions of the Bombay Civil Services Rules, 1959 shall not apply to the extent they are inconsistent with these rules. Rule 13 empowered the Government to relax operation of all or any of the provisions of these rules in case of undue hardship in any particular case as it seems just and equitable. The scheme of Rules of 1987 proceeds on the same line and certain similar provisions like Rules 12 and 13 aforesaid giving overriding effect to the rules of 1987 to the extent Bombay Civil Services Rules, 1959 are inconsistent with these Rules and power to relax the operation of these rules in case of hardship. Obviously, if resolution of June 1976 is to be considered as a

relaxation from the operation of rules of 1975, then the same cannot survive after promulgation of rules of 1987 nor can it be effective if it is inconsistent with the rules of 1987 if it has been issued under Bombay Civil Services Rules, 1959.

From the brief survey of the provisions of Rules of 1975 and the Rules of 1987 which are paramateria with each other as regards the relevant provisions for the present purposes are concerned, it is conspicuous that it primarily provides the pay-scale applicable to a post and fixation of pay by revision of existing pay drawn by the incumbent on a post as on the date of commencement of the Rules in the corresponding revised pay scale. It provided for mode of such revision of pay scale and fixation of pay on such revision in the revised scale of pay and consequential matters. However, I do not find and none has been referred to me any provisions under the Rules which deals with the question about stage at which fixation in a particular scale is to be made on appointment to a post to which the pay scale is applicable. The rules of 1975 or 1987 nowhere declare that what shall be the pay on appointment to a particular post for which pay scale has been provided. I, therefore, find that so far field of actual fixation of pay on initial appointment to the post at an appropriate stage in the pay scale applicable to the cadre is not covered by the rules of 1975 or rules of 1987.

However, if one looks at the Bombay Civil Services Rules, 1959, Chapter IV deals with fixation of pay as distinct from applicability of pay-scale to a post. Rule 40 provides that the rules 41 to 57 inclusive apply to time-scales of pay generally. They do not, however, apply to any time-scale in so far as they are inconsistent with the terms specially sanctioned for such time-scale. However, without alluding to various provisions which deal thereafter providing for fixation of pay in certain circumstances, Rule 51 which calls for attention is reproduced as under :-

"Subject to any general or special orders and any delegation that may be made by the Government in this behalf an authority may grant a premature increment or increments to a Government on a time-scale of pay."

In view of the conclusion to which I have reached above that the rules of 1975 or rules of 1987 neither concern the fixation of stage at which an appointee to a post can be fixed in the pay-scale applicable to the post

nor it deals with the question of release of increments except to the extent affecting the date of next increments, above rule 51 made in that field under the Bombay Civil Services Rules cannot be considered as inconsistent with the rules of 1975 or 1987. Rule 51 referred to hereinabove specifically empowers the State or its delegatee authority to grant premature increment or increments to a Government servant on a time-scale of pay. Going back to the resolution of 1976, it is to be seen that the authority has been delegated to the High Court to fix the pay of the incumbents on the post of the Clerk of the Court at the material stage not exceeding Rs. 650/- in the scale of Rs.500-900 provided he is posted outside the district in which he is serving. Under Rule 51 of the Bombay Civil Services Rules, 1959, concisely by the resolution, the High Court has been authorised to grant premature increments upto the stage of Rs. 650/- in the pay-scale then applicable to the post of Clerk of the Court in exercise of its power under Rule 51 of the Bombay Civil Services Rules and the same was not in relaxation and/or contrary to any of the Rules of 1975 under which the pay scale has been provided for the post of Clerk of the Court. In that view of the matter, the resolution would not come to an end automatically merely on providing different pay scale for the post under the same rules or on promulgation of new rules unless the resolution became inconsistent with the new rules under which the revised pay scales were brought into force. By reading the rules of 1975 and 1987, the conclusion is irresistible that while these rules provided for pay scale applicable to a post and ancillary provision for immediate refixation of existing pay of existing employees in the revised pay scales, the actual pay under the scale at a particular stage after the pay scales are made applicable to posts under the rules, is covered by the rules of 1959. Rules of 1959 envisages power of the Government to fix initial pay at a stage higher than the minimum of pay scale or to provide for premature increments in given situation. It also postulates delegation of such authority to other agency.

The reading of the resolution also reflects that in comparing the promotees posted as Clerk of the Court within the district, those who are posted outside the district on such promotion suffer hardship without there being any material benefit at the time of promotion and that comparison resulted in scarcity in availability of willing promotees to go outside the district. It was with object to provide added incentives to the promotees to take post outside the district, authority was delegated to the High Court keeping in view the facts and

circumstances of each case to fix the pay of the incumbents at the material stage in the pay scale than applicable to the post not beyond Rs. 650/- subject to the condition that this fixation on higher stage in the pay scale is only available in case the incumbent is posted outside the district in which he is serving. The reference to the pay scale of Rs.500-900 obviously is because at the relevant time pay scale applicable to the post was Rs. 500-900. The tenor of the order nowhere suggests that the amount of Rs. 500/- was consideration for providing higher start on promotion. Since the object was to give an attractive proposal to the prospective incumbents to the post on promotion to take assignment outside the district a distinction was made between the fixation of pay in the case of those who did not take assignment outside the district and those who took assignment outside the district. The object was to provide premature increments in the existing pay scale to such incumbents in comparison to those who were not to take assignment outside district on appointment, that object has not ceased to exist. Such resolution Government was empowered to issue only under the rules of 1959 and not under the rules of 1975 and 1987 referred to above. The resolution has not been rescinded. For the aforesaid reasons, the conclusion is irresistible that the authority of the High Court of Gujarat as a delegatee under Rule 51 of the Bombay Civil Services Rules, 1959 to fix the pay of the incumbent to the post of Clerk of the Court at the appropriate stage in the pay scale applicable to the post remains unaffected.

An argument was raised in this connection that it not only authorises the High Court to fix the pay of the incumbent at the material stage of the pay scale but also provides the maximum limit beyond which it cannot fix the pay and that being Rs. 650/- as soon as the pay scale payable was made applicable to Clerk of the district Court commenced with Rs.650/- or more the resolution became redundant . The argument is fallacious because it does not take into account that resolution was to fix at the material stage of the pay scale in a particular stage not beyond Rs.650/-. Resolution was not to fix the pay of such incumbents at Rs. 650/- irrespective of scale. A close look at the three pay scales which during the course of period have been made applicable to the post of Clerk of the Court goes to show that in the pay scale of Rs.500-900, Rs.650/- was the stage immediately before the requirement of crossing the efficiency bar was there for earning next increment. The stage of Efficiency Bar has been prescribed in the pay scale of Rs.650-1040 as referred to above at a stage immediately after reaching

the stage of Rs.810/-.. So also in the revised pay scale corresponding to Rs.650-1040 applicable to the post of Clerk of the Court under Rules of 1987 is Rs.2000-3200. The Efficiency Bar in new pay scale has been provided immediately after the stage is reached to Rs.2300/-. Therefore only reasonable manner to read the resolution is that authority to fix the pay at material stage of the pay scale applicable to the post of Clerk of the Court, in case he is posted outside the District in which he is serving on such appointment by providing premature increments was delegated to the High Court and the maximum premature increments which can be granted in a given case to an eligible incumbent was the stage immediately before the stage of crossing of Efficiency Bar provided under the pay scales as were applicable from time to time.

As a result of aforesaid discussion, the contention of the petitioners on merits is sustained. It is held that the resolution of 1976 authorising the High Court to fix the pay of Clerk of the Court (District Court) at a material stage in the pay scale applicable to the post for the time being in force at a stage not beyond the requirement of crossing of Efficiency Bar continues to be operative and the fixation made under that authority cannot be said to be erroneous or contrary to the rules of 1987.

I also find force in other submissions about the procedural unfairness in reaching the decision by the respondent- State in cancelling the orders of fixation and ordering recovery. The law is well settled. In Divisional Supdt. E. Rly V/s. L.N. Kahsri, AIR 1974 SC 1889 the Supreme Court found in some what like circumstances that the respondents were put in and confirmed in the scale of Rs. 110-180. The appellants having fixed the scale and confirmed the respondents could not reduce the scale without giving any opportunity to the respondents to be heard. Furthermore, the respondents on confirmation became entitled to rights to the post and to the scale of pay fixed by the Board. Thus rules of natural justice were held to be applicable in cases where the employer desired to tinker with pay scale fixed earlier to the disadvantage of incumbents.

In the case of Shyam Babu Verma V. Union of India, (1994) 2 SCC 521, the Court notwithstanding finding that the petitioners before it had wrongly been fixed in higher pay-scale in 1973 held against the recovery and it was held `that the petitioners were entitled only to the pay scale of Rs.330-480 in terms of

the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs.330-560 but as they have received the scale of Rs.330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973 it shall only be just and proper not to recover any excess amount which has already been paid to them.'

However, it may be noticed that that was a case in which the petitioner had been fixed in a higher pay scale itself and not at a higher stage in the pay scale applicable to it as is the circumstance in the present case.

Again the Supreme Court in the case of Sahib Ram Vs. State of Haryana, 1995 Supp (1) SCC 18 while upholding the contention of the State of Haryana that appellant before the Supreme Court did not possess the required educational qualifications entitling him to the relaxation held that the Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault.

From the aforesaid decisions, it is abundantly clear that even in case of erroneous fixation if the complicity of the incumbents is not there in such erroneous fixation but it is on account of error in bonafide exercise of authority in fixing the pay, then even on finding the fixation to be erroneous, recovery of the excess amount paid under such erroneous fixation until it is recalled in accordance with law ought not to be recovered. Therefore, assuming in the present case that the determination of release of premature increments at the time of promotion to the post of Clerk of the Court when the promotee was required to take assignment outside the district in which he was serving, the question of refixing the pay scale without notice and recovery of the amount already paid in excess until such erroneous decision is withdrawn would not arise.

As a result of the aforesaid discussion, these petitions succeed and are allowed and the respective orders of cancelling the fixation of pay and/or directing recovery of the excess amount paid to the petitioner are quashed. The case in which the incumbent on the post has

retired or expired, his terminal dues as per the aforesaid decision may be fixed as expeditiously as possible but not later than three months from the date of receipt of the writ and all arrears that may become due and payable as a result of then decision may be released within two months thereafter. If any amount has been recovered from any of the petitioners, the same may be refunded. Accordingly Rule made absolute in each case with no order as to costs.

Sd/- R. Balia, J.

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